The future of arbitration in light of the Hague Convention

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1 Overview of this thesis

1.1 The purpose of this thesis

> My purpose with this thesis is, as its title suggests, to evaluate the future of arbitration as a means of dispute resolution in light of the 2005 Hague Convention on Choice of Court Agreements (henceforth "Hague Convention"). The main focus of this thesis will therefore be on the similarities and differences between the New York Convention and Hague Convention, and if there are discrepancies that might make the option of arbitration under the former or litigation under the latter, a better option for business parties as a way of solving disputes that might arise between them in the future.

This will necessitate answering several questions. To what extent are the methods for recognition and enforcement in arbitration under the New York Convention similar to the regime for enforcement and recognition under the Hague Convention? How do the relevant systems approach the issue of validity of arbitration agreements/ choice of court agreements? What are the exceptions from the recognition and enforcement of awards and judgments under the relevant systems? More generally, what are considered to be the strengths and weaknesses of arbitration and litigation? Furthermore, what opinions do

business practitioners have on the efficacy of arbitration? These are just some of the issues that I will touch on in the course of this thesis.

1.2 The scope of this thesis

It is not easy (nor do I consider it necessary) to draw a clear line of distinction between what falls within the scope of this thesis and what does not. As I mentioned above, a number of issues must be considered in order for me to give an opinion on the future of arbitration.

1.3 Sources of law

Naturally, I will make use of the New York Convention and the Hague Convention as sources of law in this thesis. In the process of evaluating the Hague Convention, I will also consider the 2007 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (henceforth the "Lugano Convention") and Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (henceforth "Council Regulation 44/2001"). The reason I am doing this is because these systems regulate many similar matters that the Hague Convention does, and thus may be helpful in establishing the overall efficacy (or lack thereof) of the Hague Convention. The

UNCITRAL Arbitration Rules and the UNCITRAL Model Law (including the 2006 revision) will also be used for reference.

I will be making extensive use of the works of various authors on subjects like international commercial law and international arbitration, as well as specific commentaries regarding the different convention systems.

Additionally, I will be making some use of the national laws and national arbitration laws of several countries, as well as case law regarding the interpretation of the New York Convention.

1.4 Terminology

The term "recognition and enforcement" will be used with some frequency in this thesis. It is therefore necessary to clarify the meaning of the term as a whole, as well as the meaning of "enforcement" and "recognition" as separate parts.

Recognition entails the acceptance of a foreign award or judgment as having the same effect as a domestic award or judgment. Based on this recognition, the winning party can then seek to have the award or judgment given force against the losing party in the recognizing country (enforcement). In other words, an award or judgment cannot be enforced before it is recognized. However, in practice the terms often are used together.

Often both decisions are rendered in the same judgment.[1] Unless it is stated explicitly[2], the term "recognition and enforcement" in this thesis should be taken as referring to the enforcement aspect.

2 The Hague Convention, a more uniform framework for enforcement and recognition of foreign court judgments

2.1 Introduction

Arbitration as a means of dispute resolution is today a stalwart element of international commercial transactions. Many business parties insert arbitration clauses in their agreements, and leading arbitrational institutions like The International Chamber of Commerce International Court of Arbitration ("ICC"), American Arbitration Association ("AAA") and the London Court of International Arbitration ("LCIA") together have a

[1] Berger (2010) p. 677
[2] As it for instance is in Art. II of the New York Convention which deals with the recognition of an arbitration agreement

yearly caseload of several thousand disputes, many of them involving substantial sums of money.[3]

Historically however, national courts viewed arbitration with skepticism, and sometimes showed reticence in enforcing arbitration awards. Towards the second half of the 20th century this viewpoint was gradually eroded, and it became accepted by most courts that private parties should have the ability to select their own form of dispute resolution, including the option to submit their dispute to arbitration.[4]

It is reasonable to assume that this is owed to a large degree to the unifying effect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("The New York Convention"). Over 140 countries are party to the New York Convention, including all major trading states. The convention provides a framework for the recognition and enforcement of foreign arbitral awards. It is difficult to view the convention as anything but a success, with enforcement under the convention system only being refused by domestic courts in approximately 10% of reported cases.[5]

If the Hague Convention were to come into effect in a comparable number of countries, it could potentially have the same effect on the enforcement and recognition of foreign judgments that the New York Convention has had for the recognition and enforcement of foreign arbitral awards. The Hague Convention provides rules giving effect to choice of

[3] Born (2010) p. 47-49
[4] Brand (2009) p. 9-11
[5] Berger (2009) p. 678

court agreements, and for the recognition and enforcement of the resulting judgments. As Brand & Herrup point out:

"Both conventions create rules for honoring party choice of forum and recognizing the resulting tribunal decision".[6]

The accession of one more state is still necessary before the Hague Convention comes into force.[7] As of now, the United States, Mexico and the EU have all signed the convention, but only Mexico has acceded.

The 2007 Lugano Convention and Council Regulation 44/2001 also provide a comparable regime to that of the Hague Convention, but within a narrower geographic scope. However, their material scope is broader since they regulate more issues then the Hague Convention, in particular issues regarding domicile.[8] Parties to the Lugano Convention are all the Member States of the European Community, as well as Switzerland, Denmark, Norway and Iceland. Council Regulation 44/2001 applies within all Member States of the European Union, as well as Denmark.[9] Materially the two systems are very similar (as will be seen below). As pertains to membership, the Lugano Convention provides for the possibility for

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[6] Brand & Herrup (2008) p. 11
[7] Two state accessions are necessary- Hague Convention, Art 31
[8] See for instance Art. 2 and 4 of both systems
[9] Although a member of the EU, Denmark has opted out of certain areas of judicial cooperation within the Union (see http://www.um.dk/en/menu/EU/TheDanishOptouts/), thus necessitating a specific agreement with the EU extending the effects of Council Regulation 44/2001 to Denmark

non-EU or EFTA states to accede to the convention,[10] which Council Regulation 44/2001 does not.[11]

2.2 The relationship between the Lugano Convention, Council Regulation 44/2001 and the Hague Convention

The relationship between the systems is regulated under Title VII of the Lugano Convention, Chapter VII of Council Regulation 44/2001 and Art. 26 of the Hague Convention.

Given their material similarities, the potential for conflict between the two EU systems, is not as significant as the potential for conflict between them and the Hague Convention. As Pertegás points out, this was considered in the drafting process of the Hague Convention and resulted in the inclusion of Art. 26(6),[12] which states:

"This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation

[10] Lugano Convention Art. 70 (c)
[11] Pusuant to Art. 27 (3), the Hague Convention also is open to accession by all states
[12] Pertegás (2010) p. 4

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation."

A Regional Economic Integration Organisation is defined in Article 29 as an entity "…constituted solely by sovereign States which has competence over some or all of the matters governed by this Convention…".

The European Union, which as mentioned has signed the Hague Convention, falls within this category. According to Pertegás, the effect of Art. 26 (6)(a) of the Hague Convention is that:

"…the Brussels I Regulation prevails where both parties are resident in (a) European Union member state(s), or where one party is resident in an European Union member state and the other in a non-European Union state which is not Party to the Hague Convention. Where one party resides in an European Union state and the other in a non-European Union state that is a party to the Hague Convention, the latter prevails."[13]

The author goes on to say:

"Similarly, the relevant regime for the recognition and enforcement of foreign judgments depends on the origin of the rendered judgment (Art. 26(6)(b) of the Convention). Accordingly, judgments originating in an European Union court will always be subject to

[13] Pertegás (2010) p. 4

the recognition and enforcement rules of the Brussels I Regulation when recognition and enforcement is sought in another European Union member state."[14]

In the following I will consider to what extent the use of arbitration may be challenged by the introduction of such instruments. Given that the Hague Convention by its (potentially global) nature is the most analogous to the New York Convention, I will focus mainly on this instrument in my analysis.

2.3 The convention regimes for jurisdiction, enforcement and recognition- similarities and differences

2.3.1 Jurisdiction and the validity of an agreement to arbitrate/ choice of court clause

Article II (1) of the New York Convention provides that each Contracting party shall recognize an agreement to arbitration, while Art. II (3) provides that the courts of a contracting state shall, when requested by one of the parties, refer the dispute to arbitration, unless the agreement is null and void, inoperative or incapable of being performed. In other words, assuming the agreement to arbitrate is valid, the courts of a contracting state not

[14] Pertegás (2010) p. 5

only have jurisdiction to refer the dispute to arbitration, they are under an obligation to do so.[15]

This provision is comparable to the provision in Art. 5(1) of the Hague Convention, stating that a court chosen by the parties in an exclusive choice of court agreement has jurisdiction unless the agreement is null and void under the law of that state. Council Regulation 44/2001 and the Lugano Convention both regulate this issue in Art. 23, which provide that parties may choose a court or courts of a Member State to have jurisdiction over disputes that may arise in the relationship between them. Such jurisdiction is exclusive unless the parties have agreed otherwise. Unlike the New York Convention and the Hague Convention, these systems do not apply an explicit exception for where the agreement on jurisdiction is null and void. They do however have rules specifying formal requirements for the validity of an agreement conferring jurisdiction.[16]

In order to compare and contrast the solutions that the respective systems use to determine the validity of an agreement to arbitrate or of a choice of court clause, it is necessary to consider several issues:

1) The formal requirements the analyzed systems apply in determining whether an agreement is valid

[15] With certain exceptions, that will be detailed below
[16] Council Regulation 44/2001 Art. 23(1) and (2), Lugano Convention Art. 23 (1) and (2)

2) The law applicable to the question of substantive validity (ie, whether the form requirements are met).

2.3.2 Form requirements for validity of an agreement to arbitrate/choice of court clause

All the analyzed systems have regulations in this regard, but as we shall see, some of them have rather stringent formal requirements, while others are more permissive. All the systems recognize an agreement in writing[17], but differ to varying extents on what constitutes writing, and on the possibility to enter into an agreement in other ways (implicitly, orally etc).

Art. II (2) of the New York Convention refers back to "an agreement in writing" mentioned in Art. II(1) and specifies that this "…shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". However, Cordero-Moss argues that:

"The wording of the New York Convention needs to be interpreted in light of the technological context in which the Convention was drafted. The reference to 'an exchange

[17] Hague Convention Art. 3(c)(i), Lugano Convention Art. 23 (1)(a), Council Regulation Art. 44/2001 Art. 23 (1)(a), New York Convention Art. II (1)

of letters or telegrams' must be seen as a reference to the most modern means of telecommunication that were known at the time".[18]

She goes on to say that the intention of the Convention was to "…recognize arbitration agreements that were entered into by absent parties using the means of communication they generally employ in the course of their business".[19]

The author points out that a number of technological advancements in communication (telex, fax, electronic communication) have not been covered by the wording of Art. II(2), but this has not prevented courts from interpreting the provision so as to extend the effects of the provision to also cover arbitration agreements entered into via these methods.[20] To further back up this argument, she points out that the wording in Art. 7(2) of the UNCITRAL Model Law on International Commercial Arbitration[21], supports such a dynamic interpretation of Art. II (2) of the New York Convention, given their "…common line of development".[22] However, she does go on to point out that this interpretation is not uncontroversial, and the need for clarification on the issue resulted in the UN General Assembly adopting in 2006 a UNICTRAL recommendation regarding Art. II(2) of the New

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[18] Cordero-Moss (2010) p. 386
[19] Cordero-Moss (2010) p. 386
[20] Cordero-Moss (2010) p. 387
[21] Which states: "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.."
[22] Cordero-Moss (2010) p. 387

York Convention, providing that the means of communication listed therein are not to be interpreted exhaustively.[23]

To briefly summarize the above, there appears to be a general acceptance that Art. II(2) of the New York Convention is to be construed in such a manner that it covers arbitration agreements entered into through also modern forms of communication. However, the dynamic interpretation cannot be stretched so far as to also cover agreements entered into tacitly or orally. The revised 2006 UNCITRAL Model Law is more flexible in this regard, as it does not posit a written agreement as an absolute requirement.[24] However, it should be mentioned that Art. VII of the New York Convention addresses this issue in a different way. As Berg points out, Art. VII:

" …provides for the freedom of a party to base its request for enforcement of an arbitral award on the domestic law concerning enforcement of foreign arbitral awards or other treaties, instead of the New York Convention."[25]

The author goes on to highlight the rationale for this provision: it is the very goal of the New York Convention to facilitate the enforcement and recognition of foreign arbitral awards- if this goal can be achieved more easily through domestic law or international

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[23] Cordero-Moss (2010) p. 388. The author points out that while such a recommendation will not have any binding effects on governments or national judges interpreting the New York Convention, it must still be considered as having significant weight given its nature of an official view from a UN body dealing with international trade law.
[24] Cordero-Moss (2010) p. 389
[25] Berg (2008) p. 20-21

arbitration treaties, there is no reason why parties should not be able to rely on those regimes.[26]

This issue separates the New York Convention from Council Regulation 44/2001 and the Lugano Convention, both of which employ a *concrete* general rule to cover such instances, stating in Art. 23(1)(b) that an agreement conferring jurisdiction may be "in a form which accords with the practices which the parties have established between themselves". Thus, if the parties have always used (for instance) oral agreements as a part of their business practice, an oral agreement conferring jurisdiction will be just as valid as a written agreement doing the same.

They also contemplate that a valid agreement conferring jurisdiction can be established in international trade:

"..in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."[27]

Finally, both systems provide for an explicit regulation on the technological development of electronic communication, by stating:

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[26] Berg (2008) p. 21
[27] Lugano Convention Art. 23 (1)(c), Council Regulation 44/2001, Art. 23 (1)(c)

‘any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".’[28]

Art. 23 (2) of the Lugano Convention and Council Regulation 44/2001 do not provide any different effect for the issue of meeting the writing requirement itself, than that which has been applied by national courts (via dynamic interpretation) to the requirement for a written agreement in Art. II(2) of the New York Convention. However, Articles 23 (1)(b) and (c) in both systems serve the purpose of making these systems more liberal in the ways in which an agreement can come into existence.

The Hague Convention regulates the question of formal requirements in Art. 3(c)(i) and (ii), which state that an exclusive choice of court agreement must be concluded or documented in writing, or “by any other means of communication which renders information accessible so as to be usable for subsequent reference”. Brand & Herrup make three points[29] with regard to this provision.

1) National law cannot add any further form requirements to those listed in Art. (3)(c)(i) and (ii).

2) Art. 3(c) presents a low threshold for bringing an exclusive choice of court agreement within the boundaries of the Convention.

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[28] Lugano Convention Art. 23 (2), Council Regulation 44/2001, Art. 23 (2)
[29] See Brand & Herrup (2008) p. 45-46

3) Art. 3 (c) is typical of the Convention, in that it seeks to extend the scope of the Convention as broadly as possible.

The authors conclude that the effect of this choice is to:

"…create a large field of judgments eligible for recognition and enforcement under Convention rules. A high threshold requirement in terms of form would have been likely to reduce disputes on a number of issues (e.g., was there even a meeting of the minds). The price of a low threshold-and resulting wide scope of application-is likely to be a somewhat larger incidence of litigation on issues such as consent". [30]

Based on this we can see that the New York Convention takes an overall more conservative approach regarding form requirements, than the other analyzed systems. While it has been interpreted in a manner allowing it to adapt to evolving methods of communication for concluding agreements, it does not contain comparable provisions to those in the Lugano Convention and Council Regulation 44/2001 that allow for an agreement to be concluded on other bases; established practices between the parties or practices common to a particular branch of business.[31] These two conventions are arguably the most liberal with

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[30] Brand & Herrup (2008) p. 46

[31] As seen above, the more favorable law provision in Art. VII of the New York Convention can in these cases serve as an aid. However, since the provision is based on national law, there is a lack of uniformity regarding its application. Berg (2008) p.21 also points out that there is a divergence in the case law of different Contracting States with regards to the interpretation of Art. VII

regards to form requirements, with the Hague Convention somewhere in between them and the New York Convention (on paper). Art. 3 (c) (ii) of the Hague Convention is clearly analogous to Articles 23 (2) in Lugano and Council Regulation 44/2001, but the Hague Convention does not have any equivalent provision to Art. 23 (1) (b) and (c) of these systems.

The consequences of the above observations could be that, as Brand & Herrup accentuated above, an elevated level of judicial challenges directed towards choice of court agreements based on the issue of whether form requirements are met. One could argue that this is less likely to be an issue under the New York Convention, given its somewhat stricter form requirements. However, as pointed out above, the wording of Art. II of the New York Convention does not actually reflect the way in which the provision is applied. The dynamic interpretation of form requirements has made the system more flexible, but at the same time has created uncertainty regarding its application. While the relatively low threshold for form requirements under the Hague Convention might attract a not insignificant number of judicial challenges, they seem to comport better with a modern view on formal requirements for arbitration agreements. Furthermore, one might assume that because Art. 3 (c) (i) and (ii) of the Hague Convention reflect a more "updated" and consensus-driven development in this regard, that the provision will be applied with a greater degree of uniformity than has Art. II of the New York Convention.

This, I would argue, is a factor suggesting that it will be somewhat more likely for an arbitration agreement based on the New York Convention to be set aside, than a choice of court agreement under the Hague Convention.

However, to fully asses this issue of it will also be necessary to look at how the systems determine the law applicable to the null and void exception and other limitations at the jurisdictional stage.

2.3.3 Determining the law applicable to the issue of substantive validity

As pertains to the law applicable to determining whether a choice of court agreement is "null and void", the Hague Convention considers this in light of the whole law of the state of the court chosen, including that state's choice of law rules.[32] As pointed out by Richard Brand, this may allow the "…parties to the choice of court agreement to select the law of a state whose rules liberally uphold the choice of court agreements."[33]

The choice of law rule in Art. 5(1) is the concrete result of the goal of creating a uniform approach in the application of the "null and void" criteria. Since the term also appears in Art. 6 (a) and 9(a), it would create a great deal of uncertainty with regards to its content, if

[32] Brand & Herrup (2008) p. 80
[33] Brand (2009) p. 14

(for instance) a court not chosen under Art. 6(a) would lend a different meaning to the term, than a court chosen under Art. 5(1).[34]

Brand & Herrup raise the question of whether an autonomous choice of law rule actually will yield the desired uniformity, among several concerns referencing the potential problem that this requires courts other than the chosen court to apply foreign law, a task they may struggle with.[35]

Art. II (3) of the New York Convention does not by contrast have a regulation of the law determining the validity of the arbitration agreement at the jurisdictional stage. However, Art. V (1)(a) provides that recognition and enforcement of an award may be refused if:

"The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"

Since both provisions reference the same arbitration agreement, it would therefore seem to follow that the same criteria should be used in determining the validity of the agreement

[34] Brand & Herrup (2008) p. 81
[35] Ibid

whether the question pertains to the jurisdiction of the arbitral tribunal under Art. II(3) or the enforceability of the award under Art. V(1)(a). [36]

It would obviously create a great deal of uncertainty if an arbitration agreement could be found valid at the jurisdictional stage, only to be found invalid at the stage of enforcement. Such an interpretation would lead to a winning party being unable to have his award enforced.

In practice, national courts have tended to read the provisions in the context of each other. Berg states:

'Except for the Italian Supreme Court, no court has doubted that the words "the agreement referred to in article II" in ground *a* of Art. V(1) imply that the lack of written form of the arbitration agreement as required by Art. II(2) constitutes a ground for refusal of enforcement of an arbitral award…Yet, in a number of subsequent decisions the Italian Supreme Court did apply Art. II(2) in proceedings concerning the enforcement of arbitral awards…'.[37]

It thus appears as if national courts in countries party to the New York Convention for the most part, if not always, apply the same criteria in determining the validity of an arbitration agreement under both articles. As a consequence of this the validity of an arbitration

[36] Cordero-Moss (2010) p. 380-381
[37] Yearbook Commercial Arbitration Volume XXVIII-2003, Volume XXVIII (Kluwer Law International 2003) pp. 652-653

agreement, should, vis-à-vis Art. II(3), be considered in the light of the law chosen by the parties to govern the arbitration agreement, and failing such a choice- the law of the arbitral seat.[38]

Cordero-Moss states that parties usually do not specify a law to govern their arbitration agreement, meaning recourse to the law of country where the award was made (lex arbitri).[39] This "fall-back" principle is also recognized in the UNCITRAL Model Law.[40]

2.3.4 Conclusions on the law applicable to the issue of substantive validity under the relevant systems

On the whole, the Hague Convention is this respect provides a clearer and more predictable solution than under the New York Convention, where the question of substantive validity is not explicitly regulated and case law presents a somewhat fragmented picture. This creates a not insubstantial degree of uncertainty for parties relying on arbitration, and can present them with unwelcome surprises. The enhanced predictability provided by Art. 5(1) with regards to choice of law should be beneficial to commercial parties, and may be a factor pushing them in the direction of pursuing litigation over arbitration. Nonetheless, the importance of this discrepancy should not be overstated, especially given that it is too early to know how Art. 5(1) will actually be interpreted and applied in practice.

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[38] Obviously there has yet to be rendered an award at the jurisdictional stage
[39] Cordero-Moss (2010) p. 382
[40] UNCITRAL Model Law, Art. 34 (2)(a)(i) and Art. 36 (1)(a)(i)

2.3.5 Other limitations at the jurisdictional stage

It should also be pointed out that the Hague Convention provides more limits at the jurisdictional stage than the New York Convention does. Art. 6 of the Hague Convention provides that if an exclusive choice of court agreement exists, a court not selected by the parties does not have jurisdiction to hear the case. The exceptions to this are if the agreement is null and void under the law of the State of the chosen court[41], lack of capacity[42], manifest injustice[43], the agreement cannot be reasonably performed[44], or that the chosen court has decided not to hear the case.[45] In any of these cases the court not chosen may, in spite of its lack of jurisdiction, set the agreement aside.

Art. II(3) of the New York Convention provides similar, but fewer exceptions. As we've seen, the arbitration agreement being null and void is grounds for not referring the parties to arbitration, similar to Art.6 (a) of the Hague Convention.

Incapacity is also ground for the invalidity of an arbitration agreement under Art. V(1)(a) of the New York Convention. Even though this provision deals with the enforcement of awards, incapacity will also be grounds for invalidity at the jurisdictional stage. This follows not only from reading Articles II(3) and V(1)(a) in context, but also from the universally recognized legal principle that parties need capacity to enter into agreements.

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[41] Hague Convention, Art. 6 (a)
[42] Hague Convention, Art. 6 (b)
[43] Hague Convention, Art. 6 (c)
[44] Hague Convention, Art. 6 (d)
[45] Hague Convention, Art. 6 (e)

Neither the Lugano Convention or Council Regulation 44/2001 explicitly mention incapacity as grounds for invalidity of a choice of court agreement, but it must be assumed that they recognize the same principle.

Also listed in Art. II(3) is the situation that the agreement is "incapable of being performed". The wording suggests a somewhat stricter standard than Art. 6(d) in the Hague Convention, where it is sufficient that the agreement cannot be "reasonably performed" due to "exceptional circumstances beyond the control of the parties". However, according to Brand & Herrup[46], the provision is analogous to the doctrine of frustration, and covers circumstances such as:

1) Legal impossibility (the chosen court no longer exists)

2) Functional impossibility (the chosen court exists but due to a major calamity like war or natural disaster, accessing the court is not feasible) and

3) Fundamental transformation (a court by the name of the chosen court exists and access to it is possible, but it has become completely different from the court the parties selected from outset).

[46] See Brand & Herrup (2008) p. 94

It thus appears that both systems are operating with a similar approach regarding incapability of performance (that is to say, a very strict one).

The final limitation in Art. II(3) is when the agreement is deemed inoperative. According to Berg, the term can be "…said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation of the parties".[47] The outcome in this case would be the same as under Art. 6(e) of the Hague Convention, although this provision has a broader reach. Brand & Herrup state that this exception applies:

"..whenever, for any reason, *the chosen court* has decided not to hear the case. It would include sutuations where the agreement was found to be "null and void" by the chosen court under Article 5(1), bars to adjudication due to limitations on subject matter and minimum amount in controversy, and such possibilities in the United States as a transfer under 28 U.S.C § 1404(a)".[48]

In addition to the exceptions that are similar to the ones found in Articles II(3) and V(1)(a) of the New York Convention, the Hague Convention presents a further exception particular to that system under Art. 6(c). According to this provision, a court not chosen can set the arbitration agreement aside where "giving effect to the agreement would lead to manifest injustice or would be manifestly contrary to the public policy of the State of the court seised".

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[47] Berg (2008) p. 11
[48] Brand & Herrup (2008) p. 95

According to Brand & Herrup, this exception will apply only in unusual circumstances and must be used with "…the greatest circumspection".[49]

"Manifest injustice" and "manifestly contrary to the public policy" are two separate concepts, although there may be overlap in certain circumstances. Since public policy arguments are covered below (in the discussion of Art. V(2)(a) of the New York Convention and Art. 9 (e) of the Hague Convention), I will focus on only the former principle here.

Brand & Herrup go on to highlight that the term "manifest injustice" has been used in a number of Hague Conventions on private international law, and should be given the same meaning as used in Hague practice.[50] In practice this entails two aspects. Firstly the injustice must be clear, and secondly it must be extremely serious.

Taking this into consideration, it does not seem as if Art. 6(c) of the Hague Convention should prove a significant obstacle at the jurisdictional stage in enforcing choice of court clauses (although, as we shall see below, there are diverging opinions on the matter).

2.3.6 A pro-arbitration interpretation?

[49] Brand & Herrup (2008) p. 91
[50] Brand & Herrup (2008) p. 92

Born points out that national courts traditionally have taken to a "pro-arbitration" interpretation of the limits set in Art. II (3) of the New York Convention, as a consequence of which these courts have generally been reluctant to invoke these defenses that would invalidate agreements under the convention. [51] Of course, this does not guarantee that this stance will be upheld in the future, particularly in the light of an emerging criticism of aspects of arbitration (see part 6).

2.3.7 Conclusions on the enforcement of arbitration agreements under the New York Convention versus the enforcement of choice of court clauses under the Hague Convention

Based on what I have covered above, I believe the following conclusion can be drawn:

1) It is slightly more likely that the parties to an arbitration agreement under the New York Convention will have their agreement set aside at the jurisdictional stage, than the parties to an choice of court agreement under the Hague Convention. This is mainly due to the clearer form requirements in Art. 3 (c)(i) and (ii) of the latter system. However I think the exceptions provided in Art. 6 of the Hague Convention for a court not chosen and the fact that national courts have a general pro-arbitration policy when it comes to determining the validity of an arbitration agreement

[51] Born (2010) p. 129

compensates for this to a solid degree, meaning that the overall difference is relatively minor.

2) A comparison of the relevant provisions[52] in this regard suggests that there is not as much discrepancy between the two systems as one might assume. Although the Hague Convention does have more exceptions, most of them are analogous (or at least comparable) to exceptions found in the New York Convention. Where the Hague Convention does have monopoly on a particular provision (as with the issue of "manifest injustice"), the exception is normally given a very limited scope of application.

3) As pertains to the law governing the question of substantive validity of an arbitration agreement/choice of court agreement, it seems as if the explicit regulation on the matter found in Art. 5(1) and Art. 6(a) of the Hague Convention provides a clearer solution than the New York Convention. However, as already pointed out, Brand & Herrup have pointed out the potential issues that might arise from a court not chosen under Art. 6 applying the law of another state.

On the whole, the differences between the systems are not stark and it is highly questionable whether the mentioned this discrepancy in itself will make arbitration less

[52] Articles II(3) and V(1)(a) of the New York Convention versus Articles 5(1) and 6 of the Hague Convention

attractive than litigation to commercial parties. In any case it remains to be seen how extensively or restrictively courts will apply the exceptions under the Hague Convention.

3 Enforcement and recognition of awards and judgments

It can perhaps be said that the real crux of the Hague Convention is the provision that a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement is to be recognized and enforced in the courts of other Contracting States.[53] The Lugano Convention has an analogous provision,[54] as does Council Regulation 44/2001.[55]

In doing so, these instruments are seeking to accomplish the cross-border enforcement of judgments in the same way that Art. III of the New York Convention has accomplished the cross-border enforcement of arbitration awards. The ramifications of this are potentially great. Until now, arbitration has been viewed by many commercial parties as the clearly favored option when conducting business with parties in other states. The Lugano Convention and Council Regulation No 44/2001 have provided for enhanced regimes of enforcement for foreign judgments within the EU and EFTA, to the point where some

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[53] Hague Convention, Art. 8
[54] Lugano Convention, Art. 33(1) and Art. 38
[55] Council Regulation (EC) No 44/2001, Art. 33

commentators think that issues of enforcement no longer are a factor giving automatic preference to arbitration when conducting business within those areas.[56] In light of this, it is evident that the Hague Convention has the potential to have a lasting impact on the use of arbitration as a means of dispute resolution in international commerce. As Ronald Brand puts it:

"If choice of court clauses will be as easy to enforce as arbitration agreements, and court judgments as easy to have enforced as arbitral awards, then the choice between the two types of forum will necessarily hinge on the real differences between the two dispute settlement options, and not merely on the fact that one is more easily enforced than the other"[57] (my underlining).

Having considered the enforcement of arbitration agreements and choice of court clauses above, it will now be useful to determine the extent to which the enforcement regimes granted for judgments under the relevant conventions are comparable in effect to the enforcement regime for awards under the New York Convention. Having established this, I will then go on to look at the actual differences between arbitration and litigation when it comes to aspects like efficiency, confidentiality, flexibility and neutrality.

The main regulations for enforcement and recognition of awards and judgments are very similar under all the relevant regimes, providing for the enforcement of foreign

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[56] Cordero-Moss (2010) p. 367
[57] Brand (2009) p. 2

arbitrational awards / judgments in all Contracting States without any special procedure and without review as to the substantive law or facts applied by the original court or tribunal.[58]

However, it is important to note that there are exceptions to these main provisions, providing grounds by which enforcement of an award or a judgment rendered pursuant to an arbitration agreement or choice of court agreement may be refused. The number of exceptions, and the circumstances under which they may be applied, will be crucial for how the respective enforcement regimes will apply in practice.

3.1 Refusal of enforcement of awards and judgments

Article 9 of the Hague Convention provides the grounds for refusal of enforcement for that particular system. Brand & Herrup point out that it is important to recognize that the existence of any of the grounds mentioned in Art. 9 does not in itself mean that the chosen court is mandated to refuse enforcement, merely that enforcement in such a case is not required.[59] It is up to each Contracting State to determine rules for how the exceptions will apply within its jurisdiction. The same can be said for the New York Convention. The wording in Art. V(1) and (2) of the New York Convention states that recognition and enforcement "may" be refused if the grounds listed in either provision are present, granting

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[58] Hague Convention, Art. 8(2); Lugano Convention, Art. 36; Council Regulation 44/2001, Art. 36

[59] Brand/Herrup (2008) p. 110

discretion to Member States in determining the scope of the exceptions. This wording is different from the one in Art. II(3), where it is stated that a court in a Contracting State "shall" refer the parties to arbitration unless the exceptions in that provision apply. The referral under this provision is mandatory,[60] which is not the case under Art. V(1) and (2).

Art. V(1) contain grounds for refusal of enforcement that must be raised and proven by the respondents, while Art. V(2) lists grounds that a court can use to refuse enforcement on it's own initiative.

Berg points out that there is a "pro-enforcement bias" in the structure of Art. IV-Art. VI of the New York Convention, and that courts have usually followed an approach that would facilitate enforcement of awards.[61] According to him, the consequence of this is that the grounds for refusal listed in Art. V (1) will be accepted "…in serious cases only",[62] while public policy grounds listed in Art. V (2) will only be accepted in "extreme cases".[63]

3.2 Grounds for refusal of enforcement- general overview

3.2.1 Arbitration agreement/ choice of court agreement is null and void

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[60] Berg (2008) p. 10
[61] Berg (2008) p. 11
[62] Berg (2008) p. 13
[63] Ibid

The underlying agreement being null and void under the law of the State of the chosen court is grounds for refusal of enforcement under the Hague Convention.[64] It should be pointed out that this ground for refusal mirrors the exception to jurisdiction in Art. 5(1) and 6(a) that was analyzed above.

A similar provision is found in the New York Convention, although its phrasing is slightly different.[65] The Hague Convention considers only validity of the contract in light of the law of the chosen court, while the New York Convention considers this in light of the law chosen by the parties and failing such a choice, in the light of the law of the country where the award was made. However, as we've seen above, parties to an arbitration agreement often do not choose a law to govern their arbitration agreement, thus entailing recourse to the laws of the arbitral seat under most circumstances.

It would therefore seem that the practical difference is relatively insignificant. In choosing the arbitral seat, parties are indirectly choosing the law to govern their arbitration agreement. They have the flexibility to select a law to govern their agreement that is unlikely to be struck down as invalid, but rarely make use of this option. On the other hand the parties to a choice of court agreement choose the law to govern their agreement when selecting the court that is to have jurisdiction over their dispute. Thus, they have the option of choosing a court whose laws are unlikely to consider their agreement as null and void.[66]

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[64] Hague Convention, Art. 9(a)
[65] New York Convention, Art. V (1)(a)
[66] Brand also emphasizes this, p. 14

Both systems provide the parties with means by which they can regulate in a predictable manner the question of the validity of their agreement.

The Lugano Convention and Council Regulation 44/2001 do not include an explicit "null and void" exception but they do have rules about how a choice of forum can be made.[67]

3.2.2 Lacking capacity to conclude an agreement

Lacking capacity to conclude an agreement (typically because the party did not have the authority to do so) is grounds for refusal of enforcement under both New York and Hague Conventions[68], with the former considering the question of capacity in the light of the laws applicable to the parties and the latter under the laws of the requested state (meaning the laws of the state where enforcement is sought). There is an exception to this general rule if the term "null and void" regulates capacity under the applicable law. If this is the case, "…recognition and enforcement may be refused if the agreement fails the capacity test under either law of the chosen court, or that of the court addressed".[69]

The Lugano Convention and Council Regulation 44/2001 do not have any explicit regulation on this issue, but it is safe to assume that also these systems recognize implicitly the same exception.

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[67] Art. 23(1)-(4) in both systems
[68] New York Convention, Art. V(1)(a), Hague Convention, Art. 9 (b)
[69] Brand & Herrup (2008) p.112

3.2.3 Violation of due process

All the relevant Conventions provide an exception from enforcement where the defendant was unable to defend himself and present his case properly due to lack of notification.[70] There are certain differences in terms of language. The Hague Convention refers to the document that instituted the proceedings or an equivalent document, and the circumstance is that the defendant was not notified of the document in a way that gave him sufficient time to arrange for his defense. The New York Convention references two specific issues, namely that the party against whom the award was not given proper notice of the appointment of arbitrators or of the arbitral proceedings themselves, and lastly (and more generally) -that the party was otherwise unable to present his case.

It is difficult to assert whether there is any substantial difference here, as under both these systems the key issue is that that the defendant is notified in a way that allows him to defend his interests. Berg states that courts generally apply the exception in Art. V(1)(b) restrictively, accepting this ground in serious cases only,[71] and of course it remains to be seen how Art. 9(c) of the Hague Convention will be interpreted in practice by the courts of Contracting States.

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[70] Hague Convention, Art. 9 (c), Lugano Convention, Art. 34(2), Council Regulation No. 44/2001, Art. 34, New York Convention, Art. V (1) (b)
[71] Berg (2008) p. 13-14

Violations of due process can also be subject to the public policy provision in the New York Convention meaning a "…court may also on its own motion refuse enforcement of an award for violation of due process on the basis of Article V(2)(b)".[72]

The exceptions for lack of due process under Lugano and Council Regulation 44/2001 closely mirror that of the Hague Convention, including the caveat that defendant may not raise issues of notification if they did not challenge the judgment when they had the opportunity to do so. [73]

3.2.4 Inconsistency or irreconcilability with previous judgment

Most of the systems have exceptions from recognition and enforcement where the judgment sought enforced is irreconcilable or inconsistent with another judgment given previously in a dispute between the same parties in the enforcing state. [74] The wording of the provisions in Hague, Lugano and Council Regulation 44/2001 is essentially identical, although Art. 9(g) and (f) of the Hague Convention use the term "inconsistent" as opposed to the term "irreconcilable" used in the two other systems. The latter term may suggest a stricter regime, demanding utterly conflicting judgments as a prerequisite for refusal of enforcement. It would seem that it would be easier for a judgment to meet the criteria of inconsistency, although Brand & Herrup emphasize that the Hague Convention does not

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[72] Berg (2008) p. 15
[73] See Art. 34(2) of both systems
[74] Hague Convention, Art. 9 (f) and (g), Lugano Convention, Art. 34 (3) and (4), Council Regulation, Art. 34 (3) and (4).

define "inconsistent" for the purposes of Art. 9(f) and state that "…it would appear that the test for inconsistency will be found in the national law of the requested state".[75]

The New York Convention does not regulate this aspect explicitly, but this matter could be construed as falling under the public policy grounds in Art. V(2)(b), which, as will be seen below, can encompass a significant number of matters (even if they are applied very restrictively).

3.2.5 Award/ judgment not yet binding

In a somewhat similar vein, Art. V (1)(e) of the New York Convention provides that enforcement of an award may be refused where the award has not yet become binding on the parties, or has been set aside by a competent authority in which or under the law of which, that award was made. The term "binding" is used to underline the fact that, under the system of the New York Convention, it is not required to have a leave for enforcement in the country of origin for Art. V(1)(e) to come into effect.[76] Berg states that while this principle is universally accepted in national courts;

'The courts, however, differ with respect to the question whether the binding force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Indeed, a number of courts investigate the applicable law in order to

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[75] Brand & Herrup (2008) p. 120
[76] Berg (2008) p. 17

find out whether the award has become binding under that law. Other courts interpret the word "binding", without reference to an applicable law, as meaning that the award is no longer open to a genuine appeal on the merits to a second arbitral instance or to a court.'[77]

Meanwhile, the Hague Convention does not regulate the matter explicitly, but the matter can perhaps fit under the public policy exception in Art. 9(e). The enforcement of a judgment (even as in this case, a foreign judgment) that does not yet have legally binding force seems likely to be incompatible with the public policy of most nations.

Both the Lugano Convention and Council Regulation 44/2001 contemplate the same issue,[78] providing that a national court where enforcement of a foreign judgment is sought may stay proceedings if an ordinary appeal has been lodged against the judgment in the state that delivered the judgment.

3.2.6 Public policy

All the relevant conventions provide that enforcement may be refused if such enforcement would be contrary to public policy of the requested state (that is, of the state where the enforcement is sought).[79]

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[77] Berg (2008) p. 17
[78] Art. 37 in both systems
[79] Hague Convention, Art. 9 (e), Lugano Convention, Art. 34 (1), Council Regulation No. 44/2001, Art. 34 (1), New York Convention, Art. V (2) (b)

As mentioned above, Art. 6(c) uses the phrase "manifestly contrary", while Art. 9(e) uses the term "manifestly incompatible" with public policy. This can raise the question of whether there is an intended difference in the standard that is to be applied under the two provisions. Brand & Herrup state that:

"…there is a plausible position that the public policy exception to recognition and enforcement is more concrete in its application and thus may be successfully asserted more often than will the public policy ground for the exercise of alternative jurisdiction…In the case of the exception to recognition and enforcement in Article 9(e), the court addressed can compare the definite features of a foreign judgment already rendered to the dictates of the public policy of the state in which recognition and enforcement is sought. Incompatibility between an actual judgments and dictates of public policy can be known, not projected."[80]

That is not to say that the public policy exception is intended to have a wide scope of application. The authors are quick to point out that "…the intent is to have a high standard that will only rarely result in refusal of recognition and enforcement"[81].

Art. 9(e) specifies that public policy includes "situations where the specific proceedings leading to the judgment were incompatible with the fundamental principles of procedural fairness of that State". Brand & Herrup clarify that this provision is not "…an invitation to

[80] Brand & Herrup (2008) p. 117
[81] Brand & Herrup (2008) p. 118

a broad scale attack on the nature, character, or alleged conduct of the foreign judicial or legal system as a whole"[82], rather it is intended to "…capture an aspect (albeit not an identical one) of many legal systems, identified as constitutional due process, or natural justice, or right to a fair trial".[83]

Art. V(2)(b) of the New York Convention regulates public policy. Berg points out that:

"The distinction between domestic and international public policy means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purposes of domestic and international relations."[84]

The author goes on to assert that this can be seen as a consequence of giving the grounds for refusal of enforcement under Art. V of the New York Convention a very narrow application.[85]

This will be particularly true with the public policy exception. To illustrate this Berg goes on to reference a comment by a US Court of Appeal, stating that

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[82] Brand & Herrup (2008) p.118
[83] Ibid
[84] Berg (2008) p. 18
[85] Ibid

arbitral awards should be denied enforcement only when the asserted public policy "…would violate the forum State's most basic notions of morality and justice".[86]

As Cordero-Moss points out, the definition of public policy may vary from state to state, but what does not change is that "…the exception of *ordre public* has to be applied restrictively; in particular, the simple violation of a rule is in itself not sufficient to trigger applicability of the public policy clause, not even if the overriding rule is mandatory or overriding mandatory".[87]

There is thus little to suggest that the public policy exception will apply in a significantly different manner under Art. 9(e) than under Art. V 2(b) of the New York Convention. Even if the former operates with a slightly milder standard than under Art. 6(c), the exception will still only apply in very limited circumstances under both systems.

3.2.7 Exceptions particular to the New York Convention

Art. V(1)(c) of the New York Convention provides that enforcement of an award may be refused on the basis of excess of power by the arbitral tribunal.

This exception is a consequence of the fact that "…arbitral tribunal owes its very existence to the will of the parties. Consequently, it must follow the parties' instructions as to its

[86] Berg (2008) p. 18-19
[87] Cordero-Moss (2010) p. 487

composition[88], the procedure it will follow, its jurisdiction, the scope of the dispute that it is called upon to solve, the kind of remedies that it may grant".[89]

The author goes on to point out that, despite the above observation "…the arbitral tribunal enjoys a considerable freedom in respect of the law that it applies to resolve the dispute, and that this freedom goes as far as to permit the tribunal to apply the chosen law wrongly, or disregard the instructions that the parties gave in respect of what law shall be applied".[90] This applies so long as the tribunal's method does not contradict the public policy of the court exercising judicial control over the award, and does not award a decision in equity without the mandate of the parties.

The Hague Convention does not have an analogous provision (nor do the Lugano Convention and Council Regulation 44/2001), as parties litigating do not have the possibility of setting the same kind of a framework for the court as parties arbitrating can for the tribunal.

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[88] Art. V(1)(d) of the New York Convention provides an exception from enforcement where the "…composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such an agreement, was not in accordance with the law of the country where the arbitration took place"
[89] Cordero-Moss (2010) p. 449
[90] Cordero-Moss (2010) p. 449

3.2.8 Arbitrability

Arbitrability is regulated by Art. V(2)(a), and provides grounds for refusal of enforcement where "…the subject matter of the difference is not capable of settlement by arbitration…".

Art. V(2)(a) specifies clearly that the determination of whether a matter is arbitrable or not is to be determined by the "law of that country", that is to say-the laws of the state where enforcement is being sought. However, another question can be raised- whether arbitrability can fall under the invalidity exception in Art. V(1)(a). If one considers that it does, the arbitrability issue must be considered not only in light of the law of the enforcement court, but also in light of the law governing the arbitration agreement (and as we will recall, this will be the law chosen by the parties, or failing such a choice-the law of the state where the award was made). Cordero-Moss references Berg, who states that the arbitrability issue does not fall within the scope of the validity of the arbitration agreement.[91]

The arbitrability of a matter will therefore be determined by the laws of the state where enforcement is sought. As an example of this, the Norwegian Arbitration Act states in § 9 that:

[91] Cordero-Moss (2010) p. 494

"Disputes concerning legal relations in respect of which the parties have an unrestricted right of disposition may be determined by arbitration. The private law effects of competition law may be tried by arbitration".

A similar regulation is found in Section 1 of the Swedish Arbitration Act, which provides:

"Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution."

Yet another example can be found in the Dutch Arbitration Act, Art. 1020. Part 1 of Art. 1020 provides matters that are arbitrable:

"Parties may agree to submit to arbitration disputes which have arisen or may arise between them out of a defined legal relationship, whether contractual or not."

Part 3 of Art. 1020 goes on to define matters that are not arbitrable:

"The arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose."

These provisions illustrate an important thing with regards to arbitratbility: matters that are within the sphere of private law are typically always arbitrable. However, when the matter involves public law or interest, the opposite will often be the case. Cordero-Moss points out

that the rationale for the arbitrability rule is to "…preserve the jurisdiction of the courts of law in certain areas of law that are deemed to deserve a particularly accurate application of the law. This affects particularly areas of law with public policy implications, where the public interest is deemed to prevail against the freedom of the parties to regulate their own interests".[92]

It is here pertinent to point out the relationship between the issue of arbitrability and the issue of scope of application. In Art. 2(1) and 2(2), the Hague Convention lists a number matters which are outside its scope of application, including but not limited to the status and legal capacity of natural persons, contracts of employment, family law matters, wills and succession, insolvency and anti-trust matters. Contracting States may also add specific matters to this list by declaration, which will then also be excluded from the enforcement regime of the convention.[93] It is obvious that if many Contracting States were to make use of this option to exclude numerous matters, it would significantly damage the effectiveness of the Convention. However, Brand points out that Art. 2(3) and Art. 10 address the issue of potential misuse, which would assist the Convention in still operating effectively.[94] It should also be noted that a declaration pursuant to Art. 21 will have reciprocal effect. In other words, the matter will not only be excluded from enforcement in the Contracting State making the declaration, but also in every other Contracting State where the declaring

[92] Cordero-Moss (2010) p. 496
[93] Hague Convention, Art. 21
[94] Brand (2009) p. 9

State is designated in an exclusive court agreement.[95] Additionally, Art. 21 implies a fairly rigorous test before such a declaration can be made; the State must have a strong interest in not applying the Convention to the specific matter (my underlining), the declaration must pass the test of proportionality ("..no broader than necessary.."), and the specific subject matter excluded must be clearly and precisely defined.

The Lugano Convention and Council Regulation No. 44/2001 have similar provisions, although they exclude fewer matters from the scope of their respective conventions.[96] They also have rules whereby Member State courts have exclusive jurisdiction.[97] Neither Convention has a provision analogous to Art. 21 of the Hague Convention.

The New York Convention does not, in comparison, have any explicit regulation excluding certain matters from its scope like Art. 2 of the Hague Convention. It applies to all agreements "in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration"[98].

However, the scope of application of the New York Convention as provided by Art. II(1) has clear parallels to the definitions of arbitrability in national laws discussed above. In particular, the Dutch Arbitration Act uses almost the exact same wording as the New York

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[95] Brand & Herrup (2008) p 152: as the authors point out, "..a Contracting State cannot deprive its treaty partners of the benefits of the Convention through an Art. 21 declaration, then claim those benefits for itself."
[96] Lugano Convention, Art. 1(2) (a)-(d), Council Regulation No. 44/2001, Art.1 (2) (a)-(d)
[97] Art. 22 under both systems
[98] New York Convention, Art. II(1)

Convention. The Norwegian Arbitration act is based on the UNCITRAL Model Law, which as we've seen has a common line of development with the New York Convention (as well as a many similar regulations). It is therefore not a surprise that the matters deemed arbitrable under Norwegian law has a clear similarity to the matters that are arbitrable under Art. II(1) the New York Convention.

Thus, many of the matters that are outside the scope of the choice of court conventions, will also be matters that are non-arbitrable under the arbitration laws of many nations. For instance, the status and legal capacity of natural persons is excluded from the scope of the relevant systems in Art. 1(2)(a) of the Lugano Convention and Council Regulation 44/2001 and Art. 2(2)(a) of the Hague Convention. Such an issue is outside the sphere of private law and not one "…in respect of which the parties may reach a settlement" (to use the Swedish Arbitration Act as an example). The same will likely apply to all the exceptions under the Lugano Convention and Council Regulation (since the exceptions deal with matters within the public sphere such as bankruptcy and social security) and most of the exceptions under the Hague Convention. As we've seen, this may vary from state to state dependent on that nations arbitration law.

Brand & Herrup compare Art. 2 of the Hague Convention with Art. II(1) of the New York Convention and comment that the fact that the latter does not have a catalogue of exclusions from its scope '…may mean that matters excluded from the scope of the Hague Convention are within the scope of the New York Convention. On the other hand, the specific exclusions in the Hague Convention are likely to provide a somewhat greater

certainty at the outset than is possible under the New York Convention, which requires reference to national law of the appropriate states to determine whether a matter is "capable of settlement by arbitration"'[99]

It should also be noted that the arbitrability exception has led to refusal of enforcement in very few cases.[100]

To briefly summarize the above observations in the form of two main points:

1) The matters deemed non-arbitrable are not very numerous and are applied restrictively.
2) The matters often coincide with matters outside the scope of the choice of court conventions.

Based on the above analysis, there is not a gulf between the New York Convention and the choice of court conventions with regards to the scope of the respective systems, when one factors in the issue of arbitrability. To take the geology analogy further, the distance is perhaps more reminiscent of a narrow crevice. The Lugano Convention and Council Regulation 44/2001 provide relatively few exclusions from their scope, and all of them pertain to matters that are typically non-arbitrable under the laws of most states. The Hague Convention has the most exclusions, but I do not think these are significant enough to

[99] Brand & Herrup (2008) p. 218-219
[100] Berg (2008) p. 19

detract considerably from its efficiency (although there are those who contend the opposite, see below) and make litigation under the Hague Convention to any appreciable extent less attractive than arbitration under the New York Convention.

3.2.9 Conclusion on exceptions from enforcement under the relevant systems

Having compared the grounds for refusal of enforcement of a judgment in Art. 9 of the Hague Convention and Art. 34 of the Lugano Convention and Council Regulation 44/2001, with the grounds for refusal of enforcement of an award under Art. V(1) and (2) of the New York Convention, I believe the following conclusions can be drawn:

1) There is a substantial amount of overlap in the grounds enumerated in all the compared systems.

2) It is of particular interest to note that there is little discrepancy between the regulations in the New York Convention and the Hague Convention. Both systems contemplate refusal on grounds such as the agreement being null and void, lacking capacity of a party to conclude the agreement, violation of due process and violation of public policy (the arbitrability exception will be discussed below in conjunction with issues relating to scope of application). While the systems might not be exactly analogous, they are similar enough that the choice between litigation

and arbitration should not on this basis be compelled to any strong degree in either direction.

4 The implication of exceptions- diverging opinions

4.1 Born

Born mentions that there is no world-wide foreign judgments convention yet in force, and most of his discussion is based on this fact. He emphasizes that while there is, under the laws of many states, a presumptive enforceability of foreign money judgments, these are subject to a significant number of exceptions, which make it "..difficult to seek the enforcement of foreign money or other judgments with any degree of confidence".[101] He is however clear that enforcement of such judgments will be far easier where the parties seek enforcement in a state covered by the Lugano Convention and Council Regulation 44/2001.[102] Nevertheless, as pertains to the enforcement regime offered by the Hague Convention, Born remains skeptical. Although he does state that the coming into force of the convention could enhance such enforcement, the exceptions "..may materially detract

[101] Born (2010) p. 134
[102] Ibid

from its practical utility"[103] and concludes that "at least for the foreseeable future, international arbitration agreements will therefore enjoy a substantial 'enforceability premium' as compared to the forum selection clauses."[104]

4.2 Brand & Herrup

Brand & Herrup state that in deciding between arbitration and litigation, a deciding factor might be that "…matters excluded from the scope of the Hague Convention are within the scope of the New York Convention".[105] In other words, the enforcement regime provided by the New York Convention comes with fewer caveats than the Hague Convention and may thus be preferable.

In doing so Brand & Herrup are echoing some of the sentiments voiced by Born, in that the Hague Convention perhaps has too many exclusions from its scope to achieve an effective enforcement regime in comparison with the enforcement regime offered by the New York Convention. However, they also go on to say:

"On the other hand, the specific exclusions in the Hague Convention are likely to provide somewhat greater certainty at the outset than is possible under the New York Convention,

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[103] Born (2010) p. 24
[104] Born (2010) p. 10
[105] Brand & Herrup (2008) p. 218

which requires reference to national law of the appropriate states to determine whether a matter is 'capable of settlement by arbitration'."[106]

They also opine that Council Regulation 44/2001 provides for a superior system of enforcement than does the Hague Convention:

"To a large extent, recognition and enforcement are automatic under the Regulation. The grounds of refusal, set out in Articles 33 to 37 of the Regulation, are more restricted than the grounds of refusal under Article 9 of the Convention."[107]

Nevertheless Brand & Herrup are significantly more optimistic than Born that the exceptions under Art. 9 of the Hague Convention will not have a sufficiently detrimental effect on the application of the Convention, stating that the "…grounds on which recognition and enforcement may be refused are generally similar, with the list being somewhat longer under the Hague Convention".[108] After an overview of the different grounds for refusal of enforcement, their conclusion is:

"These differences are not likely to be sufficient at the outset of a transaction to tip the balance in favor of either arbitration or litigation".[109]

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[106] Brand & Herrup (2008) p. 219
[107] Brand & Herrup (2008) p. 302
[108] Brand & Herrup (2008) p. 219
[109] Brand & Herrup (2008) p. 220

On the whole, it seems that Brand & Herrup take a rather more positive view on the potential of the Hague Convention than Born does. While pointing out potential problems with its enforcement regime, mainly related to the exclusions from the Conventions scope and the exceptions from its applicability, they reach a consensus that the differences between the Hague and New York conventions are "not likely to be significant in the choice between arbitration and litigation";[110] their similarities are greater than their differences.

4.3 Cordero-Moss

On the subject of enforcement Cordero-Moss states that in the areas covered by the Council Regulation 44/2001 and the Lugano Convention (EU and EFTA), "court decisions enjoy the same regime as arbitral awards".[111] As pertains to the Hague Convention, the author refers to it as "partly similar"[112] to the aforementioned systems without going into a direct comparison.

She also points out that national courts in most states have moved towards a clear pro-arbitration stance.[113] On this point, Cordero-Moss and Born are in agreement, although the former seems more optimistic that the Hague Convention may provide an effective enforcement regime for foreign judgments.

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[110] Brand & Herrup (2008) p. 221
[111] Cordero-Moss (2010) p. 367
[112] Cordero-Moss (2010) p. 24
[113] Cordero-Moss (2010) p. 490

With regard to the exceptions in Art. V of the New York Convention she highlights that these are "exhaustive and must be interpreted restrictively."[114].

4.4 Teitz

Teitz accentuates that the exceptions from the scope of the Hague Convention are a consequence of the difficulties of achieving a satisfactory compromise to be agreed upon by states with often significantly different political agendas, and particularly in harmonizing the civil and common law legal traditions. [115]

With regards to the refusal of enforcement under the Hague Convention, and exclusions from its scope[116], Teitz has a different viewpoint from Born, arguing that the exceptions are only allowed under "narrowly defined circumstances."[117] The possibility for states of adding specific matters to the list in Art. 2 pursuant to Art. 21 is described as "very limited"[118] and the author follows this by opining that the "strictly reciprocal nature of any opt-outs may well have a disciplining effect".[119]

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[114] Cordero-Moss (2010) p. 439
[115] Teitz (2006) p. 550
[116] In this case Articles 2 and 9
[117] Teitz (2006) p. 551
[118] Teitz (2006) p. 553
[119] Ibid

The author criticizes certain aspects of the convention (including the fact that a non-chosen court may nevertheless render an enforceable judgment instead of dismissing the case, pursuant to Art. 6)[120] but draws the conclusion that the Convention should make "…litigation a more viable alternative to arbitration because it ensures the enforcement of forum selection clauses just like the New York Convention guarantees the enforcement of arbitration clauses".[121]

4.5 Conclusion on the comparability of the enforcement regimes

While the above commentators diverge somewhat on the potential impact of the exceptions in the Hague Convention vis-à-vis its efficiency as an enforcement mechanism, there is at least consensus that the Convention will (should it come into force in a considerable number of states) make litigation a more attractive option by imposing an enforcement system similar (if not equivalent or exactly analogous) to that available under the New York Convention.

This is, in a sense, rather obvious. It is possible to argue that the enforcement mechanism under the Hague Convention will be prevented by its exceptions and exclusions from doing for foreign judgments what the New York Convention has done for arbitral awards. It is far more difficult to assert that the Hague Convention will not create a status quo whereby

[120] Teitz (2006) p. 554
[121] Teitz (2006) p. 557

litigation will be viewed as at least a legitimate alternative in cross-border business transactions, where arbitration has previously been viewed as the often only reliable method for dispute resolution.

On one hand the Lugano Convention and Council Regulation 44/2001 provide a framework of enforcement which perhaps surpasses the Hague Convention in terms of material efficiency (having as pointed out above, fewer exceptions and exclusions from their functioning). However given their more regional application, their overall effect is insufficient to challenge the position of arbitration in any other territories than those which fall under their scope. In a globalized world, where Brazilians do business with Germans, Americans with Malaysians and Norwegians with Ghanaians, and where constantly evolving methods of travel, transportation and electrocommunication make cross-border commerce always more enticing, the need for a predictable, uniform and above all else world-wide enforcement regime is exquisitely obvious. Before the Hague Convention actually enters into force and there is established at least some case law regarding its provisions, it is difficult to pinpoint exactly how enforcement of foreign judgments under the convention will play out in practice. Regardless it does seem reasonable to assume that the Hague Convention would place the parties in a position where the choice between litigation and arbitration will to a greater extent "…hinge on the real differences between the two dispute settlement options, and not merely on the fact that one is more easily enforced than the other."[122] The differences between arbitration and litigation and

[122] Brand (2009) p. 2, and referenced earlier in this thesis.

arguments advocated in favor and disfavor of both options, will be detailed in the following.

5 Arbitration and litigation, a comparison of strengths and weaknesses

For parties engaging in cross-border business transactions, it is particularly important to regulate in their agreement a method for dispute resolution should a conflict arise. Once a conflict has already arisen, it can be difficult for the parties to agree on anything whatsoever, which obviously includes under what kind of system the dispute will ultimately be resolved.

Having concluded above that the enforcement regimes for arbitration under the New York Convention and the similar regimes under the Hague Convention, Lugano Convention and Council Regulation 44/2001 are similar enough that the aspect of the enforcement of an award or judgment is not sufficient on its own to make parties favor one of the options over the other (this is based on the supposition that the Hague Convention comes into force), it will therefore be necessary to compare other aspects that might tilt the balance in the favor of either arbitration or litigation, including: efficiency, confidentiality, expertise, neutrality and procedural flexibility.

5.1 Confidentiality

A key difference between arbitration and litigation, is that court proceedings are normally conducted publicly, while the arbitration process is not. Many states have their court proceedings open not only to the public, but also the media, as a consequence of which the proceeding as well as outcome of the case may be disseminated to a substantial number of people. In contrast, arbitration is conducted with only those involved directly, typically the parties themselves, the members (or member) of the arbitration tribunal and at times witnesses and experts. Arbitration awards are rarely published, while judgments often are.[123]

Nonetheless, confidentiality is by no means a given in arbitration. There are legal systems where there is no obligation towards confidentiality on the legislative plan, such as Norway and Sweden.[124] In these places the arbitration rules of the local arbitral institutions (assuming institutional arbitration is used by the parties) ensure confidentiality.[125] However, if the parties have not submitted their dispute to an institution, but simply chosen arbitration in a certain state, they run the risk of having no confidentiality if the state in question has an arbitrational rule whereby there is a presumption for non-confidentiality unless the parties expressly derogate from this rule. The courts of other states (Canada,

[123] As an example, in Norway, a substantial number of judgments are published online on the site www.lovdata.no
[124] Cordero-Moss (2010) p. 362
[125] Ibid

Australia) have also been known to reject a general implied duty of confidentiality in arbitration where the parties have not regulated this in their agreement.[126]

Whether institutional (an specialized arbitration institution administers the process) or ad hoc arbitration (the parties administer the process themselves, selecting arbitrators, the procedure to be followed etc) is chosen by the parties, they are able to regulate the confidentiality of their dispute in a way which parties submitting to litigation would not: either by selecting an institution where such confidentiality is a part of the institutions rules[127] or by including a confidentiality clause if they are using ad hoc arbitration and have selected an arbitral seat where confidentiality is not guaranteed. Yet another option is for the parties to select the UNCITRAL Arbitration Rules to regulate their agreement. The original UNCITRAL Arbitration rules did not include any regulation of confidentiality, but this was amended in a 2006 revision.[128] The rules now provide that the "…hearing shall be held in camera unless the parties agree otherwise"[129] and that the award cannot be made public without the consent of both parties.[130] There is no similar provision safeguarding the confidentiality of the arbitral procedure itself.

However, it should be pointed out that investment arbitration (as opposed to commercial arbitration) is subject to a different system with regards to confidentiality. The key

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[126] Emma Van Son (2008) p. 3
[127] For instance in the rules of the Stockholm Chamber of Commerce Arbitration Institute and in the ICC arbitration rules.
[128] Amendments by the United Nations Commission on International Trade Law on July 7, 2006
[129] UNCITRAL Arbitration Rules, Art. 25.4
[130] UNCITRAL Arbitration Rules, Art. 32.5

difference between the two forms of arbitration is that investment arbitration does not only involve the interests of the parties directly involved in the dispute, but a potentially much larger sphere of persons and entities. Cordero-Moss uses the example that the commercial interests of the investor, based on the results of negotiations in the host state, might be at odds with the interests of the local community, necessitating public proceedings. [131] Furthermore there is an issue at the state level, since decisions regarding the meeting of certain standards (typically based on public international law regulating protection of investment) will be of interest to not only the host state, but also to other states that may base their future conduct on the results on the case.[132] The consequence of these factors is a differing approach to confidentiality than is normally the case with arbitration. While the rules for investment arbitration of the ICSID[133] have many similarities with those applicable to commercial transactions:

"The information available in respect of investment protection is systematic and transparent, and awards are diligently and systematically published, analyzed, commented and classified in the name of a harmonized development in this branch of law".[134]

A hindrance towards a more complete harmonization is the issue that not all investment disputes are carried out within the ICSID framework.[135] However, the UNCITRAL

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131 Cordero-Moss (2010) p. 363
132 Ibid
133 International Center for Settlement of Investment Disputes, an institution of the World Bank Group established in 1966
134 Cordero-Moss (2010) p. 363
135 Cordero-Moss (2010) p. 364

Working Group II recently discussed the possibility of amending the UNICITRAL Arbitration Rules to achieve a similar regulation to ICSID on transparency and publicity in investment disputes. Although there was general agreement that such an amendment would be positive, lack of consensus regarding how such transparency would actually be achieved in practice (along with time constraints) meant that no such regime was introduced.[136] This notwithstanding, it should be pointed out that the Working Group was green lighted by the UNCITRAL Commission to work specifically on the issue of transparency in investment arbitration. The groups last meeting (its 54th session) was held in New York in February 2011, and as of yet there is no concurrence on the issue.[137]

Based on the above it is reasonable to claim that arbitration, as per now, offers an overall higher level of confidentiality than litigation. However, this might not be viewed as positive by the parties in all circumstances. They may in fact wish that the details of their dispute be made public. Born makes this point, stating:

"Where a company has a standard form contract, used with numerous counter-parties, it may want interpretations of the contract to be publicly known, and binding through precedent, as widely as possible. Thus, financial institutions, intellectual property licensors,

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[136] Ibid
[137] See http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (Read 22/02/2011)

and franchisors may see litigation as a way to generate public awareness or case law that has an impact beyond the parties to a litigation".[138]

In the same vein, litigation can be seen as preferable for companies wishing to "clear themselves" in situations where accusations have been leveled against them (for instance for business malpractice). Recourse to arbitration could be seen as a way of resolving uncomfortable accusations in secrecy. This of course pre-supposes a certain confidence on the part of the company that they are not culpable.

5.2 Procedural flexibility

Generally, procedural rules in national courts are not flexible. Parties submitting to litigation may decide the law to govern their dispute, and also, as we've seen (pursuant to the Hague Convention) select an exclusive forum in which to adjudicate their dispute. By comparison, adopting arbitration will allow the parties not only the choice of law and forum, but also the composition of the arbitral tribunal and rules on the admittance of evidence. They may even go into great detail, for instance by specifying the needed qualifications of the arbitrators[139] or the range of sums that may be awarded by the tribunal to the winner of the dispute (a so called "high-low" arbitration clause).[140]

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[138] Born (2010) p. 12
[139] Born (2010) p. 75
[140] Born (2010) p. 105

There can be little doubt that, from the outset, arbitration provides more flexibility for parties than litigation does. That is not to say however, that such flexibility should always be considered a strength. Cordero-Moss emphasizes that such flexibility can be used to delay the proceedings or can endanger the accuracy of the decision due to oversimplification.[141]

5.3 Neutrality

Another factor traditionally advanced in favor of arbitration is the purported neutrality of arbitral tribunals. Born claims that many national courts are "…distressingly inappropriate choices for the resolving of international contract disputes"[142], referencing lack of experience, competence and judicial integrity as reasons for this viewpoint. He further highlights that a benefit of arbitration is that the parties can select the nationality (among other qualifications) of the arbitrators, which may prevent prejudice or bias against any of the parties. Furthermore, if a three-person tribunal is used, the parties may choose to select arbitrators from different legal traditions, enhancing the parties confidence in the procedural fairness of the tribunal.[143]

One of the benefits of the Hague Convention is that it, as mentioned above, gives the parties the power to designate a specific court for the solving of future disputes in an

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[141] Cordero-Moss (2010) p. 365
[142] Born (2010) p. 8
[143] Born (2010) p. 8

exclusive choice of forum agreement. With regards to the issue of neutrality, this entails that parties may choose a forum that they both agree is neutral. A good selection for the neutrality criteria (as well as the expertise criteria, covered below) might according to Born be the courts of England, Switzerland or New York, given the ability of these jurisdictions to "…resolve complex transnational disputes with a fairly high degree of reliability".[144]

Cordero-Moss too considers neutrality a potential strength for arbitration, but emphasizes that this rests on the condition that the tribunal has been properly chosen.[145] This is by no means a given, neither with institutional arbitration nor ad hoc arbitration. Both experienced and inexperienced arbitration institutions can make unfortunate appointments, in the same way that national courts can make mistakes that may cost the parties dearly. The difference is that there is less possibility for the parties to appeal against such mistakes when they occur in the arbitration process, given the lack of appellate review available under such circumstances.

Nevertheless, it is submitted by some commentators that while some national courts may be able to provide a similar procedural neutrality (to that offered by arbitration) in certain cases, hardly any may offer the "…resources and experience possessed by a tribunal of three experienced international arbitrators".[146]

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[144] Born (2010) p. 8
[145] Cordero-Moss (2010) p. 367
[146] Born (2010) p. 9

On the whole it would seem that the Hague Convention, with its exclusive choice of court provisions in Art. 1 and Art. 3, would be a significant boost for parties seeking to rely on litigation in this respect. In the same way that parties to an arbitration agreement can designate the country where the arbitration is to have its seat, parties litigating can designate the national forum for deciding their dispute and in doing so indirectly selecting the laws under which the process shall be carried out. Unlike arbitration they cannot directly choose the law to govern the proceedings (in other words, one that is different from the law of forum the parties have selected). That is not to say that this should be viewed as a significant weakness as it is highly questionable whether this should be done in any case. As Redfern & Hunter point out:

"It is not easy to understand why parties might wish to complicate the conduct of an arbitration in this way (unless, as is possible, they do not understand what they are doing)"[147]

5.4 Expertise

Another factor that parties should take into consideration is the expertise of the decision makers. As we saw above, parties submitting to litigation may not select the judges that will rule on their case, while parties submitting to arbitration have considerable control over the members of the arbitral tribunal. As such they may specify certain qualifications

[147] Redfern & Hunter (2004) p. 87

needed for the arbitrators, for instance an in-depth knowledge of a particular branch of business, a degree within a specific field or fluency in a certain language. Cordero-Moss emphasizes that parties using litigation have no guarantee that the judges have the technical or commercial insight to fully understand the dispute.[148] Furthermore the judges may have trouble applying the law the parties have chosen to govern their agreement, if the law is one that the judges are unfamiliar with.[149] It seems safe to assume that the parties would have a better chance of achieving a knowledgeable review of the dispute by either selecting an arbitral institution well-known for its ability to appoint arbitrators with a high-level of expertise, by specifying qualifications (as exemplified above), or by appointing the arbitrators directly.

Similar observations made under point 5.3, can also be applied here: the ability of parties to chose an exclusive forum for the settlement of their dispute under the Hague Convention should balance out the equation to some extent. Parties would be able to select a forum with a reputation for its ability to handle disputes requiring significant business-specific insight and with proficiency in applying the law that the parties have subjected their agreement to.

However, there is another side to the party autonomy granted to the arbitrating parties. The most important one is the risk that a party appoints an arbitrator who is not impartial, but rather becomes an active advocate for the appointing party. This could lead to the opposing

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[148] Cordero-Moss (2010) p. 365
[149] Ibid

party doing the same, and could end with a situation characterized by procedural inefficiency, gridlock and ultimately a resulting award of highly dubious quality. Cordero-Moss states that the "…possibility to choose the arbitrators is a reason to prefer arbitration only if the chosen arbitrators are impartial and act professionally".[150]

It is difficult to disagree with this, but on the whole it seems likely that parties taking a responsible approach to the selection of their arbitrators (either directly or indirectly through a renowned institution) would have a better chance of achieving a procedure and outcome that fully take into account all technical and commercial aspects of the dispute, than parties submitting to litigation (even under an exclusive forum agreement). It is unrealistic to expect judges to have the equivalent knowledge within specific branches of business of arbitrators selected precisely for their knowledge within that branch.

5.5 Efficiency and costs

Born is quick to make the point that arbitration has both been argued to be, by some, a cheaper and quicker method of dispute of resolution than litigation, and by others as a slower and more costly option.[151] He then goes on to state:

"In reality, both international arbitration and international litigation can involve significant expense and delay, and it is difficult to generalize about which mechanism is necessarily

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[150] Cordero-Moss (2010) p. 366
[151] Born (2010) p. 7

quicker or cheaper in every case. Nonetheless, some general conclusions can be drawn".[152] The authors main points following this statement can be condensed as follows[153]:

1) International commercial arbitration involves certain costs that do not exist under litigation, including: payment to the arbitrators themselves, the arbitration institution (if one is used), logistical expenses for travel and lodging to the arbitral seat, and rent of hearing rooms.

2) On the other hand, litigation will usually be clearly more expensive where there are parallel or multiple proceedings in national courts. However, with an exclusive forum selection clause under the Hague Convention that yields an enforceable judgment, this argument does not carry much weight in favor of arbitration.

3) Expenses in arbitration will not usually match those that might occur under the appellate review process in litigation. Since there is usually no appellate review for arbitration awards, these might typically cost less and take shorter time. To this it can be interjected that there are also many ways in which an arbitral proceeding can be delayed. Furthermore, as pointed out above, the validity of an award can be brought before national courts on several grounds.[154] While the grounds are fairly limited and applied narrowly, they may nonetheless potentially contribute towards

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[152] Ibid
[153] All the points (1-4 and a-c) are touched upon in Born (2010) p. 7-8
[154] New York Convention Art. V and UNCITRAL Model Law on International Commercial Arbitration, Art. 34 and Art. 36

significantly elongating the process of enforcement for the award, by putting it through an appeals process taking considerable time.

4) Although settling a dispute in national courts can take substantial time, the arbitration process is not necessarily speedy either. Disputes will often require between 18 to 36 months before a final award is reached, and may take even longer if the procedure is delayed as a consequence of (for instance) procedural mishaps or a challenge of aspects of the award before national courts. This issue can be somewhat ameliorated by the parties in a number of ways:

    a) They can appoint only one arbitrator as opposed to three. This will obviously be more efficient, but special care must be taken when selecting the arbitrator given the power that will then be left in that persons hands.[155]

    b) The parties may insert a "fast-track" arbitration clause in their agreement, which essentially entails a simplified procedure to be followed by the tribunal. Such clauses might typically be used where the dispute is not overly complex. Its use does however raise other issues, particularly with regards to the procedural necessities (like the right to present one's case properly[156])

[155] Cordero-Moss (2010) p. 374
[156] New York Convention, Art. V (1) (b)

c) The parties can also set a timetable within which the award must be rendered, or even more specifically with detailed timeframes for each step of the procedure. While Born states that such methods can be effective, he is also quick to point out the strategy also has its risks: the parties may be imposing unrealistic conditions on the tribunal, and additionally, the validity of the award (as well as the arbitration agreement) may be challenged if the award is not rendered within the granted timeframe.[157]

One the whole, the commentators make it clear that issues of efficiency and cost do not strongly favor choosing either arbitration or litigation. Born says that "international arbitration does not generically have either dramatic speed and cost advantages or significant disadvantages as compared to national court proceedings", [158] although he does go on to qualify that statement by saying that generally arbitration will be faster due to lack of appellate review.

Spigelman is also critical of the idea that arbitration is cheaper and faster than litigation, stating:

"Although it is often said that international commercial arbitration is preferable because it is capable of delivering a quicker and cheaper dispute resolution

[157] Born (2010) p. 95
[158] Born (2010) p. 8

procedure, I am not convinced that that actually occurs in practice. Indeed, users of international commercial arbitration are increasingly expressing the view that they prefer alternative mechanisms such as mediation, by reason of the costs of arbitration."[159]

It therefore seems accurate to postulate that the cost and speed of a dispute resolution process will vary greatly depending on the nature and complexity of the dispute, and that it is difficult to generalize whether arbitration or litigation will be preferable under these criteria. One might venture that litigation could be preferable if the parties are reasonably sure that a judgment in their dispute will not be appealed or if the parties simply do not have the resources to pay the substantial sums often required for arbitration (typically for medium or small sized businesses). On the flip side arbitration may be seen as preferable under these criteria for large multinational companies with plentiful resources, as they can afford the cost of arbitration, and have the insight in how to tailor the arbitration agreement to assure a relatively efficient process.

5.6 Conclusions

[159] Spigelman (2009) p. 23

First I think it should be pointed out that it is inaccurate to state that either litigation or arbitration is the overall "superior" method for dispute resolution. Both approaches have their strengths and weaknesses, and parties will have to evaluate a number of factors before making their choice. A particularly important factor in this regard is the weight that the parties place on the above factors: there is no reason to assume that they will all be equally important. Confidentiality may be key for companies whose focus is on not revealing its business tactics or maintaining its squeaky-clean image. Expertise may be viewed as the most important factor for companies involved in very complex and technical business transactions. Neutrality may be seen as the most critical factor if the companies have experienced biased outcomes before.

Also, some companies may not place as much weight on certain of the above factors. Companies with enormous monetary assets might take the view that "money is no object"- the cost is no obstacle.

While it is difficult to generalize, I believe the following conclusion can be drawn. For parties for whom expertise, confidentiality and neutrality are the deciding factors, arbitration may be a better choice. Even with the ability for parties to insert an exclusive choice of forum clause in their agreements, and thus select a jurisdiction known for their competence within these areas, it will be difficult to match the arbitral tribunals in these respects. While certain jurisdictions have a good deal of experience with (even quite complex) business transactions, it is not realistic to expect them to compete in terms of

expertise with arbitrators selected precisely for their depth of knowledge within the particular area that is the object of the dispute.

Similar observations can be made for neutrality, although perhaps to a lesser extent: there are a good number of jurisdictions that provide an unbiased and fair review of the merits of a dispute. There is also the issue that parties may select arbitrators that become advocates for them, rather than neutral parties. Nevertheless, considering the many undeveloped jurisdictions around the world, it seems fair to assume that parties submitting to arbitration would have a somewhat better chance at getting an unbiased result.

Confidentiality is a criterion where it is difficult for the national court system, given its normally open nature, to compete. While there are exceptions to confidentiality for arbitration, both under certain state laws and for particular areas of business- these are in the end exceptions. While there is no guarantee for confidentiality under arbitration, there is very little chance for any confidentiality whatsoever under litigation.

It should however be noted that the costs of a dispute resolution process can be of deciding importance for a company. Paying the often (exorbitant) fees needed for an arbitration process can be quite unrealistic for small and even medium-sized companies and as we will se below, arbitration is under some pressure to adapt to the criticism of being overly expensive.

In other cases than the ones mentioned above, it does not seem as if either arbitration or litigation offers any major advantages or disadvantages. This conclusion has a caveat, namely that it is based on the assumption that the Hague Convention will come into force. Without the Hague Convention, parties will not have the ability to select an exclusive forum (known for its positive qualities) in which to have their dispute adjudicated and have the subsequent judgment enforced effectively world-wide (which also assumes the accession by a number of states comparable to those party to the New York Convention). Until such a time where the Hague Convention comes into force, arbitration should therefore remain the favored method for dispute resolution in most international commercial disputes, barring only where the parties are within the confines of the Lugano Convention and Council Regulation 44/2001. In these cases the conclusion at the top of this paragraph will apply.

6 The future of arbitration

Earlier in this thesis, I have alluded to a growing criticism of arbitration.
This part of the thesis is intended to look at some of these criticisms, and consider these in the light of the evolution of international litigation through the choice of court conventions I've covered in the course of the preceding pages (with particular emphasis on the Hague Convention). I will do this by evaluating several studies where practitioners (mainly counsel) voice their opinions on different aspects of arbitration.

If the general consensus among practitioners is sufficiently and increasingly negative to the use of arbitration, it might suggest that arbitration is in danger of losing its position as a preferred method for dispute resolution in cross-border commerce. Stipanowich references an ABA symposium spotlighting "The Vanishing Trial", which is characterized by a substantial drop off in number of cases (both at a federal and state level) resolved in American courts in the period 1962 to 2002.[160] The author goes on to say that the declining use of litigation "…may be attributed at least in part to business and public concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships."[161]

As we shall see, it is possible to argue that arbitration may be headed down a similar path. The consequences could be a similar decline in the use of arbitration, in lieu of other methods for dispute resolution- perhaps including a resurgence for litigation.

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[160] Stipanowich (2010) p.5- (*Arbitration: The "New Litigation".)*

[161] Stipanowich (2010) p.5- it should be pointed out that most of Stipanowich's commentary is in reference to domestic arbitration as opposed to international arbitration, which is the focus of this thesis. However, I would argue that such factors remain relevant, especially considering that in many cases, the arbitration is carried out through the same institutions and display many similar traits- (*Arbitration: The "New Litigation".)*

6.1 Arbitration becoming the "new litigation"?

However, the perhaps most prevalent criticism of arbitration is in fact that it is increasingly becoming more and more similar to the process of litigation. The president of an organization of surety companies formulated this criticism in the following way:

"…arbitration has turned into essentially litigation, with all the expense of litigation, and without the court".[162]

A similar frustration was expressed sardonically by Lord Mustill, when he stated that international arbitration had "…all the elephantine laboriousness of an action in court, without the saving grace of the exacerbated judge's power to bang together the heads of recalcitrant parties".[163]

Stipanowich provides an explanation for why arbitration has seemingly moved in this direction:

"In order to grapple more effectively with a wide range of business disputes, including many large, complex cases, arbitration procedures have tended to become longer and more detailed, and lawyers bring to bear the same tools of zealous advocacy they employ in

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[162] Lynn Shubert, as referenced by Stipanowich (2010) p. 34- (*Arbitration: The "New Litigation")*
[163] Stipanowich (2010) p. 26 –(*Arbitration and Choice: Taking Charge of the "New Litigation")*

litigation."[164]

The author then goes on to reference several issues contributing to this, including:

1) The expansion of discovery (that is to say, the process in which each party can obtain evidence from the opposing party, for instance by requesting documents).

2)"Docketing" problems (as the author points out: "The problem of finding mutually acceptable dates is exacerbated by the use of a three-member tribunal, common in commercial arbitration. Such realities may be readily exploited by parties hoping to benefit from delay")[165]

3) The judicial review of arbitral awards; Stipanowich references a 2004 study that might indicate that arbitral awards are coming under tougher scrutiny in the courts of key commercial states in the United States (New York, California, Connecticut) and may in these states be as "…vulnerable to reversal as court trial judgments".[166] He does however also point out that caution must be used in drawing conclusions from a study with such a small sample size. [167]

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[164] Stipanowich (2010) p. 12-13- (*Arbitration: The "New Litigation")*
[165] Stipanowich (2010) p. 17- (*Arbitration: The "New Litigation")*
[166] Stipanowich (2010) p. 18-19- (*Arbitration: The "New Litigation")*
[167] Stipanowich (2010) p. 18-19- (*Arbitration: The "New Litigation")*

With these criticisms in mind (as well as the criticisms covered in Part 5 of this thesis), I will now briefly look at a study that deals with the level of satisfaction that legal practitioners have with arbitration as a system.

6.2 Queen Mary University study

The most comprehensive and recent study on this subject is entitled: "International Arbitration: Corporate attitudes and practices 2008". The survey is sponsored by PricewaterhouseCoopers and was carried out by the Queen Mary University of London. According to the executive summary, the study was carried out over 6 months, and uses the data from 82 questionnaires and 47 interviews with corporate counsel (in major corporations that use arbitration).[168]

In the executive summary, one can read the following:

"International Arbitration has long asserted its superiority over transnational litigation – not least when it comes to producing an end result. Through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it claims to offer prevailing parties a better chance of obtaining enforcement of awards in most countries around the world. But does International Arbitration actually deliver?"[169]

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[168] Queen Mary Study (2008) p. 7
[169] Ibid

As I see it, the key findings of the study (as pertains to this thesis) are as follows:

6.2.1 Use of international arbitration

When queried on what method for the resolution of international disputes was used the most by the corporation, 44% of the respondents indicated they mostly used international arbitration, while 41% indicated they mostly used transnational litigation. In a similar 2006 study, the percentage preferring litigation was lower.[170]

6.2.2 Satisfaction with international arbitration

86% of the respondents were satisfied with international arbitration (with 18% being very satisfied, and 68% being fairly satisfied). Only 5% were disappointed. According to the study, the disappointed respondents were displeased with the "…increased costs of arbitration and delays to proceedings."[171] However, most of the respondents "…spoke of the major benefits of arbitration, particularly the enforceability of arbitral awards, the flexibility of the procedure and the ability to select experienced arbitrators."[172]

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[170] Queen Mary Study (2008) p. 10
[171] Ibid
[172] Ibid

6.2.3 Recognition and enforcement of arbitral awards

According to the study, the majority of the corporations that had sought the enforcement of awards had not encountered any major problems in doing so. Of those surveyed, 19% had encountered such problems.[173] In turn, 70% of these problems related to either the lack of assets of the award debtor, or being unable to identify or access the assets of the debtor.[174] In 17% of the cases the respondents gave the reason that the place of enforcement and recognition was hostile to foreign awards.[175] Only 6% reported such difficulties due to the fact that the New York Convention was not applicable[176] (in other words, the state in which enforcement was sought was not a signatory to the New York Convention).

6.2.4 Factors influencing the place of enforcement

Interestingly, the most significant factor for the respondents in deciding where to seek enforcement of an award, is the place where the award debtor has sufficient assets (with 27% reporting this as the most important factor).[177]

By contrast, 20% of the respondents would place most weight on the applicability of the New York Convention.[178] This does not necessarily imply that the New York Convention is not a crucial part of international arbitration. One could argue that parties do not consider

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[173] Queen Mary Study (2008) p. 15
[174] Ibid
[175] Ibid
[176] Ibid
[177] Queen Mary Study (2008) p. 16
[178] Ibid

the question its applicability a determinative factor since it is well-known that virtually all relevant commercial states are signatories[179], therefore making other issues more relevant.

6.2.5 Conclusion on corporate attitudes towards arbitration

I believe the Queen Mary Study suggests that there is (as of now) no reason to proclaim the downfall of international arbitration as a means of dispute resolution in international business transactions. The data indicates a solid support for the use of international arbitration, and a general satisfaction with the results that it yields. At the same time, I think it is important to highlight several matters:

1) When comparing the 2008 Queen Mary Study to the similar study carried out in 2006[180] (again sponsored by PricewaterhouseCoopers), the data of the former shows an increase in preference for transnational litigation in comparison with the latter. While arbitration remains the preferred method (44% to 41% as referenced above), it is interesting to note that litigation appears to be closing the gap. Whether this is a trend that will continue in the future, is a matter on which one can for now only speculate.

[179] See the official list of non-signatory nations here: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

[180] Queen Mary Study (2008) p. 4

2) Despite the general satisfaction with international arbitration that the Queen Mary Study suggests, it is clear that there also is a not insignificant level of criticism being leveled at international arbitration as a system. In particular, the often considerable costs of arbitration are mentioned as a contentious issue. As mentioned above, another criticism is that the process of arbitration is becoming too similar to a court trial.

If arbitration is to remain the preferred and premier option for dispute resolution in international commercial disputes, it is crucial that it as a system adapts to the challenges posed by other such methods. Mediation is becoming increasingly more popular, and the Hague Convention may come into effect in a short while making transnational litigation far more attractive than previously. It is up to the arbitration institutions around the world to rise to this challenge, if international arbitration as a system is to remain competitive. If they do not do this, international arbitration may very well fade into obscurity.

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